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ALAMI VEGETABLE OIL PRODUCTS SDN BHD v. HAFEEZ IQBAL OIL & GHEE INDUSTRIES (PVT) LTD

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
HAMID SULTAN ABU BACKER JCA
B UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: B-02-1571-07-2013]
15 JUNE 2016

C ***ARBITRATION:*** *Award – Enforcement – Application for recognition and enforcement of awards as judgments – Opposition to application – Issues relating to merit of award – Whether could be raised under s. 38 of Arbitration Act 2005 ('AA') – Whether should have been brought under s. 39 AA – Whether s. 38 only permitted domestic and foreign award to be recognised and enforced – Whether appellant failed to appreciate s. 3 AA which recognises domestic international*
D *arbitration – Whether appeal meritorious*

STATUTORY INTERPRETATION: *Construction of statutes – Purposive approach – Whether judicial decision not to be confined to law – Whether common sense approach to be recognised*

E The appellant appealed against the judgment of the High Court in respect of an application by the respondent for two arbitration awards issued in Malaysia, to be recognised and enforced as judgments pursuant to s. 38 of the Arbitration Act 2005 ('AA 2005'). The appellant filed an opposing affidavit as to why the respondent's application should not be allowed. It was the appellant's argument that (i) before the 2011 amendment to the AA 2005,
F s. 38 only permitted a domestic and foreign award to be recognised and enforced under s. 38; and (ii) s. 2 defines domestic arbitration to mean any arbitration which is not an international arbitration.

Held (dismissing appeal with no order as to costs)
G **Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:**

(1) It is not permissible to argue issues relating to the award or merit of the award *etc* under s. 38 of the AA 2005 as the merit of the award cannot be an issue under s. 38, whereas it is permissible to place such an argument in an application under s. 39 of the AA 2005. Section 38 is
H a 'recognition procedure' to convert an arbitration award to a judgment and can only be done by the person holding an arbitration award. As long as the procedure had been satisfied, the award must be recognised. (paras 2, 3 & 7)

(2) For s. 39 to apply, the application must be made by the respondent to
I the award. In this case, the respondent to the award was the appellant and no such application had been filed. Instead, the appellant had only filed an opposing affidavit stating why the respondent's application should not be allowed. What was before the court was a s. 38

application which was in respect of the merit of the award, which was irrelevant consideration at the stage of s. 38 application. Therefore, the appeal had no merit and was an abuse of judicial process as the appellant had not taken the argument before the court by a proper application under s. 39 of the AA 2005. (paras 2, 9 & 14)

(3) It was immaterial whether the arbitration award was a domestic award, domestic international award or foreign award. To subscribe to the appellant's simplistic argument on 'domestic arbitration' and 'international arbitration', without recognising that s. 3 of the AA 2005 recognises a domestic international arbitration, would not accord with the purposive approach to interpretation of statute. Further, judicial decision must not be confined to law but also common sense which is also called purposive approach and is partly codified. (paras 4 & 12)

(4) To accept the appellant's argument that a domestic international arbitration award was not enforceable under s. 38 in Malaysia, when one of the purposes of the AA 2005 is to encourage Malaysia to be the seat of arbitration, would bereft common sense as well as destroy the excellent effort of KLRCA as well as the Government to make Malaysia the preferable seat and/or destination for international arbitration. Reading ss. 2, 3 and 38 together, the appellant's argument was not sustainable in law. (para 12)

Bahasa Malaysia *Headnotes*

Perayu merayu terhadap penghakiman Mahkamah Tinggi berkaitan permohonan oleh responden bagi dua award timbang tara di Malaysia, diisytiharkan dan dilaksanakan sebagai penghakiman menurut s. 38 Akta Timbang Tara 2005 ('Akta'). Perayu memfailkan afidavit menentang mengapa pemohonan responden tidak wajar dibenarkan. Hujahan perayu adalah bahawa (i) sebelum pindaan 2011 kepada Akta, s. 38 hanya membenarkan award domestik dan luar negara diisytiharkan dan dilaksanakan di bawah s. 38; dan (ii) s. 2 mendefinisikan timbang tara domestik sebagai bermaksud apa-apa timbang tara yang bukan timbang tara antarabangsa.

Diputuskan (menolak rayuan tanpa perintah untuk kos)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Isu-isu berkaitan award atau merit award dan sebagainya di bawah s. 38 Akta tidak boleh dihujahkan kerana merit award tidak boleh menjadi isu di bawah s. 38, manakala hujahan sedemikian dibenarkan dalam permohonan di bawah s. 39 Akta. Seksyen 38 adalah 'prosedur pengisytiharan' untuk mengubah award timbang tara kepada penghakiman dan hanya boleh dibuat oleh orang yang mempunyai award timbang tara. Asalkan prosedur tersebut dipatuhi, award tersebut mesti diisytiharkan.

(2) Bagi s. 39 diguna pakai, permohonan perlu dibuat oleh responden kepada award tersebut. Dalam kes ini, responden kepada award adalah perayu dan tiada permohonan sebegitu difailkan. Sebaliknya, perayu hanya memfailkan afidavit menentang yang menyatakan mengapa permohonan responden tidak wajar dibenarkan. Apa yang dikemukakan di mahkamah adalah permohonan s. 38 berkaitan dengan merit award, yang tidak wajar dipertimbangkan di peringkat permohonan s. 38. Oleh itu, rayuan ini tidak bermerit dan adalah salah guna proses kehakiman kerana perayu tidak mengemukakan hujahan tersebut di mahkamah melalui permohonan yang sewajarnya di bawah s. 39 Akta.

(3) Tidak penting sama ada award timbang tara adalah award domestik, award domestik antarabangsa atau award negara asing. Menerima hujahan perayu yang merupakan pendekatan mudah berkaitan 'timbang tara domestik' dan 'timbang tara antarabangsa', tanpa mempertimbangkan bahawa s. 3 Akta mengakui timbang tara domestik antarabangsa, tidak selari dengan pendekatan bertujuan kepada pentafsiran statut. Selanjutnya, keputusan kehakiman tidak boleh terhad kepada undang-undang malahan akal fikiran yang juga dikenali sebagai pendekatan bertujuan dan sebahagiannya telah dikanunkan.

(4) Menerima hujahan perayu bahawa award timbang tara antarabangsa tidak boleh dikuatkuasakan di bawah s. 38 di Malaysia, apabila salah satu tujuan Akta adalah untuk menggalakkan Malaysia menjadi sidang timbang tara, adalah tidak masuk akal dan juga akan memusnahkan usaha baik KLRCA dan juga Kerajaan untuk menjadikan Malaysia sebagai sidang yang lebih disukai dan/atau destinasi bagi timbang tara antarabangsa. Membaca ss. 2, 3 dan 38 bersama-sama, hujahan perayu tidak boleh dikekalkan di sisi undang-undang.

Case(s) referred to:
International Bulk Carriers SPA v. CTI Group Inc [2014] 8 CLJ 854 CA ***(refd)***
Setiausaha Kerajaan Negeri Selangor v. Perbadanan Riadah Sdn Bhd [2016] AMEJ 1178 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 2, 3(3)(a), 37, 38, 39(1)(a)(ii), 42
Interpretation Acts 1948 and 1967, s. 17A

Other source(s) referred to:
Hamid Sultan Abu Backer, *Birds Eye View of International Arbitral Process: Malaysian Chapter*, KLRCA Newsletter October-December 2015, pp 20-24

For the appellant - Mohd Iskandar Ismail; M/s Basharuddin Fa'izie Iskandar
For the respondent - Ajit Kumar; M/s Ajit & Co

[Editor's note: Appeal from High Court, Shah Alam; Originating Summons No: 24-26-01-2013 (affirmed).]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/defendant appealed against the judgment of the learned High Court Judge in respect of an application by the respondent/plaintiff/claimant for two arbitration awards issued in Malaysia, to be recognised and enforced as judgments, pursuant to s. 38 of the Arbitration Act 2005 (AA 2005). The award in question was related to s. 3(3) of the AA 2005 which states as follows:

> 3. Application to arbitrations and awards in Malaysia
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> ...
>
> (3) In respect of an international arbitration, where the seat of arbitration is in Malaysia:
>
> (a) Parts I, II and IV of this Act shall apply; and
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> (b) Part III of this Act shall not apply unless the parties agree otherwise in writing.

[2] What is important to note in the instant case is that it is not permissible to argue issues relating to the award or merit of the award, etc. under s. 38 of the AA 2005 as the merit of the award cannot be an issue under s. 38, whereas it is permissible to place such an argument in an application under s. 39 of the AA 2005. The respondent's application was premised under s. 38 (which has to be read with s. 39) as evidence in the intitulement to the application found at pp. 14 to 17 vol. 1 Part A of the appeal record. For s. 39 to apply, the application must be made by the respondent to the award. In this case, the respondent to the award was the appellant/defendant and no such application had been filed but only an opposing affidavit stating why the respondent/plaintiff's application should not be allowed. The reasons for the objection were stated as follows:

> 6. Saya telah dinasihati oleh Peguam cara Defendan dan sesungguhnya percaya bahawa "Appeal Board Award" adalah awad timbang tara yang berlandaskan "international arbitration", mengikut Seksyen 2 "Arbitration Act 2005". Jika diperhatikan dalam seksyen tersebut dan bahawa tidak ada sebarang peruntukan dalam Akta tersebut yang membenarkan awad yang melandaskan "international arbitration" boleh didaftarkan sebagai satu Penghakiman dalam bidang kuasa Mahkamah Yang Mulia ini. Seksyen 38 "Arbitration Act 2005" yang dengan muktamad dan secara menyeluruh meliputi "arbitration award" yang boleh didaftarkan sebagai penghakiman tidak merujuk kepada "Award" yang melandaskan "international arbitration".
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> 7. Saya juga telah dinasihati oleh Peguam cara Defendan dan sesungguhnya percaya bahawa dengan nyatanya Plaintif tidak berhak mendaftarkan "Appeal Board Award" kerana, mengikut Seksyen 38 "Arbitration Act 2005" Mahkamah Yang Mulia ini

A hanya mempunyai bidang kuasa untuk memasukkan Penghakiman untuk awad berdasarkan "Domestic Arbitration" atau "from a Foreign State".

8. Saya menyatakan bahawa dalam premis ini dan alasan di atas sahaja berdasarkan isu undang-undang tersebut, permohonan Plaintif harus ditolak dengan kos oleh Mahkamah Yang Mulia ini.

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9. Selanjutnya dan/atau secara alternative Defendan menyatakan di sini bahawa "Appeal Board Award" adalah tidak sah di sisi undang-undang kerana Timbang tara "Appeal Board" yang bersidang telah melampaui bidang kuasanya dan/atau di luar bidang kuasa dalam membuat "Appeal Board Award" tersebut semasa persidangan rayuan yang diadakan pada 27.5.2010.

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[3] The appellant had not appreciated the distinction between ss. 38 and 39 of the AA 2005. Section 38 procedure is a 'recognition procedure' to convert an arbitration award to a judgment. This can only be done by a person holding an arbitration award. If the respondent to the award wants to object to the procedure, he can file an affidavit to do so. (See *International Bulk Carriers SPA v. CTI Group Inc* [2014] 8 CLJ 854; [2014] 6 MLJ 851). If the respondent to the award wants to object to its enforcement, then an application under s. 39 setting out one of the grounds must be made by the respondent to the award. To put it in another way, the appellant in the instant case was attempting to convince the court 'to put the cart before the horse', that too without making an application under the mandatory provision to challenge the enforcement of the award.

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[4] It is immaterial whether the arbitration award is domestic award, domestic international award (s. 3(3) award) or foreign award. An award has to be classified in one of the groups stated above. That is to say, an international award can be a foreign award and/or domestic international award when the seat of arbitration is in Malaysia. In an international arbitration, where the seat is in Malaysia, it is now referred to as domestic international award. (See articles by Hamid Sultan bin Abu Backer titled: (i) '*Birds Eye View of International Arbitral Process: Malaysian Chapter*' (KLRCA Newsletter October-December 2015, pp. 20-24); (ii) '*Astro Lippo: Is 'Passive Remedy' An Anathema to The Enforcement of International Arbitration Award? Malaysian Chapter*' (KLRCA Newsletter October-December 2015)). This distinction is made out in s. 3 of the AA 2005.

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[5] The distinction between a domestic award, domestic international award and foreign award for purpose of this judgment is this:

(a) for domestic award, ss. 37, 38, 39 and 42 will be applicable;

(b) for domestic international award, ss. 37, 38 and 39 will be applicable and s. 42 will not be applicable unless parties have opted in for Part III of the AA 2005 to be made applicable; and

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(c) for foreign award only, ss. 38 and 39 will be applicable.

[6] By whatever name the parties want to identify the award in this case, one must keep in mind that ss. 38 and 39 will be applicable. (See Chapter 2 of *International Arbitration With Commentary To Malaysian Arbitration Act 2005* (2016) by Datuk Dr Haji Hamid Sultan bin Abu Backer).

[7] Section 38 is a procedural provision to seek recognition of an award. As long as the procedure set out in this section is satisfied the award must be recognised. It is not at this stage for the court to hear arguments related to s. 39 of the AA 2005, unless there is a formal application by the appellant. In the instant case, there was no argument before the learned trial judge or before us that procedural requirement for s. 38 was not satisfied. The said s. 38 reads as follows:

38. Recognition and enforcement.

38.(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.

[Am. Act A1395:s.7 - Prior text reads - "(1) On an application in writing to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action".]

(2) In an application under subsection (1) the applicant shall produce:

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

[8] As long as there is an award and the procedure in s. 38 is satisfied, the award needs to be given recognition. Any objection to the legal validity of the award or any other complaint on the award can only be taken by s. 39 procedure which reads as follows:

39. Grounds for refusing recognition or enforcement.

39.(1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked:

A (a) where that party provides to the High Court proof that:

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;

B [(1)(a)(ii) Am. Act A1395: s. 8 - Prior text reads - "the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;"]

C (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

D (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

[(1)(a)(v) Am. Act A1395: s. 8 - Prior text reads - "subject to subsection (2), the award contains decisions on matters beyond the scope of the submission to arbitration;"]

E (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

F (vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by G arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

(2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1)(a)(vii), the High Court may, if it considers it proper, adjourn its H decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award I which contains decisions on matters submitted to arbitration may be recognised and enforced.

In the instant case, the argument of the appellant may fall within the compass of s. 39(1)(a)(ii) but it has to be taken by way of an application.

[9] What was before the learned trial judge was a s. 38 application. What was the complaint before the learned trial judge and before us by the appellant was in respect of the merit of the award, which is irrelevant consideration at the stage of a s. 38 application. Any complaint in respect of the award by the appellant can only be considered under s. 39. The learned trial judge did not deal with a s. 39 of the AA 2005 application. The complaint of the appellant is reflected in the memorandum of appeal which reads as follows:

> 1. Yang Arif Hakim Yang Bijaksana, Hakim Mahkamah Tinggi telah terkhilaf di sisi prinsip undang-undang dan fakta apabila membenarkan permohonan Responden melalui Saman Pemula bertarikh 7/1/2013 untuk menguatkuasakan keputusan "Award of Arbitration Final Award" bertarikh 11/2/2009 dan "Final Appeal Board Award" bertarikh 24/5/2010 yang mana kedua-dua keputusan tersebut adalah berbeza antara satu sama lain, dan Mahkamah masih membenarkan Saman Pemula tersebut walaupun Responden gagal memperincikan secara mutlak Saman Pemula Responden tersebut.
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> 2. Yang Arif Hakim yang Bijaksana, Hakim Mahkamah Tinggi telah terkhilaf apabila gagal mengambil kira bahawa "Section 38 of the Arbitration Act 2005" adalah bersifat "silent" bagi "international arbitration" di mana terpakai bagi syarikat Responden yang merupakan syarikat berdaftar di Pakistan. Yang Arif Hakim gagal mengambil kira fakta ini dan mengabaikan seksyen yang berkaitan dalam "Arbitration Act 2005" iaitu seksyen "interpretation" di mana berdasarkan "interpretation" tersebut, jelas timbang tara yang dijalankan adalah bersifat "international arbitration" dan seterusnya Mahkamah Tinggi tidak mempunyai bidang kuasa untuk mendengar Saman Pemula tersebut.
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> 3. Yang Arif Hakim yang Bijaksana, Hakim Mahkamah Tinggi telah terkhilaf apabila membenar dan menguatkuasakan keputusan "Appeal Board" bertarikh 24/5/2010 yang mana keputusan dibuat melangkaui batas walaupun tiada bukti bahawa Plaintif membeli 10,000 ton metrik RDB Palm Oil pada 24/7/2006 dan ganti rugi am berjumlah RM266,300.00 dialami Plaintif/Responden tidak pernah dibuktikan.
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> 4. Yang Arif Hakim yang Bijaksana telah terkhilaf dalam undang-undang dan fakta apabila Saman Pemula tersebut dibenarkan walaupun Permohonan terbabit merujuk "Arbitration Act 2005" dan bukan "Arbitration Act 1952" seperti yang dipersetujui parti-parti, sepertimana dalam "PORAM/FOSPA 81" bagi menjadi sandaran kepada transaksi terbabit.

[10] The appellant in this case took a very simplistic argument before us to say that: (i) before the 2011 amendment to the AA 2005, s. 38 only permitted a domestic and foreign award to be recognised and enforced under s. 38; (ii) s. 2 defines domestic arbitration to mean any arbitration which is not an international arbitration. In placing the argument, the appellant totally did not submit on s. 3 of the AA 2005 or on purposive interpretation under s. 17A of the Interpretation Acts 1948 and 1967 or common sense approach to technical arguments. Section 3 of the AA 2005 reads as follows:

A 3. Application to arbitrations and awards in Malaysia

(1) This Act shall apply throughout Malaysia.

(2) In respect of a domestic arbitration, where the seat of arbitration is in Malaysia:

B (a) Parts I, II and IV of this Act shall apply; and

(b) Part III of this Act shall apply unless the parties agree otherwise in writing.

(3) **In respect of an international arbitration, where the seat of arbitration is in Malaysia:**

C (a) **Parts I, II and IV of this Act shall apply**; and

(b) Part III of this Act shall not apply unless the parties agree otherwise in writing.

(4) For the purposes of paragraphs (2)(b) and (3)(b), the parties to a D domestic arbitration may agree to exclude the application of Part III of this Act and the parties to an international arbitration may agree to apply Part III of this Act, in whole or in part. (emphasis added)

Section 17A of the Interpretation Acts 1948 and 1967 reads as follows:

Regard to be had to the purpose of Act

E 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

F **[11]** A reading of the AA 2005 before 2011 amendments will show that Parliament had at least three types of award in mind which can be recognised and enforced in Malaysia. They are as follows:

(a) domestic award;

(b) domestic international award as this is borne out in s. 3 itself though the G word 'domestic international' is not used but it says 'international arbitration where the seat of arbitration is in Malaysia'. That will mean and relate to the facts of the appellant's case where the respondent is a Pakistani company. If it is a domestic international, award s. 3(3)(a) will apply to say that Parts I, II and IV will apply. Sections 38 and 39 come H within Part II of the AA 2005. That is to say, notwithstanding a flawed definition of domestic award by the draftsman in s. 2, s. 3 makes it clear that a domestic international arbitration award is capable of recognition and enforcement under ss. 38 and 39 of the Act. This flawed definition was subsequently corrected by the 2011 amendment to s. 38 of the AA 2005.

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[12] In our view, to subscribe to the appellant's simplistic argument on 'domestic arbitration' and 'international arbitration', without recognising that s. 3 has provision to recognise a domestic international arbitration, will not accord with the purposive approach to interpretation of statute. In addition, Lord Denning had often reminded us that judicial decision must not be confined to law but also common sense which we these days called as purposive approach and is partly codified. (See s. 17A of the Interpretation Acts). At times, without the application of common sense, a just result cannot be achieved. Common sense approach has been adopted in a number of Malaysian judgments. (See *Setiausaha Kerajaan Negeri Selangor v. Perbadanan Riadah Sdn Bhd* [2016] AMEJ 1178). To accept the appellant's argument that a domestic international arbitration award is not enforceable under s. 38 in Malaysia, when one of the purposes of the AA 2005 is to encourage Malaysia to be the seat of arbitration, will bereft common sense as well as destroy the excellent effort of KLRCA as well as the Government's effort to make Malaysia the preferable seat and/or destination for international arbitration. Had the appellant taken the trouble to read ss. 2, 3 and 38 (before the 2011 amendments) together, the appellant would have realised that the appellant's argument was not sustainable in law. In any event, at the time the originating summons was filed on 7 January 2013, the 2011 amendments to the AA 2005 had already come into force (on 1 July 2011).

[13] The appellant's complaint was misconceived and arises as a result of failure to appreciate the distinction between ss. 38 and 39 of the AA 2005. The appellant's submission in our view was nothing more than convoluted arguments which did not permit us to allow the appellant's appeal, when in fact there was no s. 39 application in the instant case and/or no appreciation or proper appreciation of s. 3.

[14] Notwithstanding our view on domestic, domestic international arbitration and international arbitration (foreign awards), from the reading of s. 38 which links to s. 39, the appellant should have taken the argument before the learned trial judge by a proper application under s. 39. As this was not done, we took the view that the appeal had no merit and was an abuse of judicial process.

[15] For reasons stated above, we unanimously dismissed the appellant's appeal with no order as to costs. Deposit was to be refunded.

We hereby ordered so.